Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *R. C. v. Canada Employment Insurance Commission*, 2018 SST 353

Tribunal File Number: GE-17-3362

BETWEEN:

R. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Catherine Shaw

HEARD ON: April 5, 2018

DATE OF DECISION: April 25, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The Tribunal finds the Appellant voluntarily left his employment without just cause because, having regard to all the circumstances, he did not demonstrate he had no reasonable alternatives to leaving.

OVERVIEW

[2] The Appellant was within his six-month probationary period when his employer held a meeting in which they raised issues they had with his performance and informed him that his probationary period was being extended. The Appellant believed the meeting and the extension of his probationary period were precursors to dismissal and submitted a letter that his employer accepted as his resignation. The Tribunal must determine whether the Appellant voluntarily left his employment without just cause.

ISSUES

[3] Issue 1: Did the Appellant voluntarily leave his employment?

[4] Issue 2: If so, did the Appellant have just cause to leave his employment?

ANALYSIS

[5] Subsection 30(1) of the *Employment Insurance Act* (Act) provides that a claimant is disqualified from receiving any EI benefits if he voluntarily left any employment without just cause.

[6] The Respondent has the burden of proving that the Appellant left voluntarily. The burden then shifts to the Appellant to establish he had just cause for doing so, by demonstrating that, having regard to all the circumstances, on a balance of probabilities, he had no reasonable alternative to leaving (*Canada (Attorney General) v. White*, 2011 FCA 190). The term “burden” is used to describe which party must provide sufficient proof of its position to overcome the legal test. The burden of proof in this case is a balance of probabilities, which means it is “more likely than not” the events occurred as described.

Issue 1: Did the Appellant voluntarily leave his employment?

[7] When determining whether the Appellant voluntarily left his employment, the question to be answered is: did the employee have a choice to stay or leave (*Canada (Attorney General) v. Peace,* 2004 FCA 56)?

[8] The Appellant submitted to the Respondent, a letter he sent his employer via e-mail dated June 11, 2017 in which he states that his employer's decision to extend his probationary period is not acceptable to him. He further states that, based on the issues raised in the meeting that he had with the employer on June 8, 2017 that he is "clearly not able to fulfill the terms of the employment contract" and concluded with a request for his employer to terminate his employment within his probationary period. The Appellant testified that his employer responded to this e-mail by accepting his resignation.

[9] The Tribunal finds the Appellant took the initiative to end his employment by sending his employer a letter informing him that he desired a termination of their work relationship. Accordingly, the Tribunal finds the Appellant voluntarily left his employment as he had the choice to stay in his position and chose to resign.

Issue 2: Did the Appellant have just cause for voluntarily leaving his employment?

[10] The test for just cause is whether the Appellant, having regards to all the circumstances, on a balance of probabilities, had no reasonable alternative to leaving his employment. Section 29 of the Act sets out a non-exhaustive list of circumstances for the Tribunal to consider when determining whether the Appellant had just cause for leaving his employment. The Tribunal must weigh all of the circumstances to determine whether he has established "just cause". (*White*, supra)

[11] The Appellant submitted that he had just cause for leaving his employment, namely he was being subjected to pressure by the employer to leave his job and that continuing in that position after the meeting would be detrimental to his health and his career, such that he had no alternative but to leave when he did.

[12] The Respondent submitted that the Appellant had alternatives available to him that he did not consider and, instead, made a decision to quit.

Did the Appellant's working conditions constitute a danger to his health and safety?

[13] Subparagraph 29(c)(iv) of the Act states that the Appellant has just cause for voluntarily leaving an employment if he had no reasonable alternative, having regard to all the circumstances, including working conditions that constitute a danger to health and safety.

[14] The Appellant argues that the meeting with his employers on June 8, 2017 created an unhealthy and hostile work environment and that he believed the stress of working in that environment would have quickly affected his physical and mental health.

[15] The Appellant testified that at the meeting his employers raised a number of issues and told him they wanted improvement but did not offer him a clear guideline about what corrective actions to take. He presented the argument that his employer's request for improvement without clear direction would have caused him an inordinate amount of stress as he attempted to guess what improvements they wanted. He testified that he "believed the stress level would become very high very quickly that would have affected [his] physical health."

[16] The Appellant voluntarily leaving his employment because of his fears of the dangerous conditions at his work is considered an essential condition of paragraph 29(c)(iv) by the Federal Court. The Appellant does not have just cause to leave his employment without first discussing with his employer whether measures could be instituted to reduce this fear (*Canada (Attorney General) v. Hernandez*, 2007 FCA 320).

[17] The Tribunal finds that the Appellant has not proven he had just cause to voluntarily leave his employment due to working conditions that constitute a danger to health or safety. The Appellant's testimony and written submissions regarding the stressful and unhealthy work environment are based on his opinion about what may have occurred in his future employment with the company. The Tribunal finds that the Appellant has not provided any evidence that he was subjected to the stress and scrutiny that he believes was impending and, therefore, has not proved the work environment constituted a danger to his health and safety such that there were no reasonable alternatives to him leaving.

Was the Appellant subjected to harassment?

[18] Subparagraph 29(c)(i) of the Act states that the Appellant has just cause for voluntarily leaving an employment if he had no reasonable alternative, having regard to all the circumstances, including sexual or other harassment.

[19] The Appellant testified that the presentation and way the meeting was conducted was antagonistic and constituted harassment. The Appellant stated that his direct supervisors, the President and Vice-President of the company, and a representative from Human Resources (HR) were present during the meeting. The Appellant stated that he felt he was under the threat of being fired during the meeting, but testified that his employer did not threaten to fire him at any point, but that the extension of his probation and the issues raised during the meeting gave him the opinion that he would be dismissed within a very short period of time.

[20] He states that during the meeting, this representative was "controlling the outcome" by giving notes to the President and Vice President and that it was the HR representative that recommended the extension of his probation. The Appellant objected to his performance being evaluated by the HR representative, who was not his direct supervisor, but states that the President and Vice President of the company were allowing the HR representative to present the issues with the Appellant's performance at the meeting.

[21] The Appellant testified that one of the issues raised at the meeting was that this representative was offended by an incident involving the Appellant that occurred several months prior wherein the HR representative asked him for feedback on a document and the Appellant's feedback was negative. The Appellant gave his opinion that the HR representative held a personal vendetta against him because of this incident. When asked, the Appellant stated that he did not feel that any harassment existed prior to the meeting and testified that he previously had a healthy working relationship with his supervisors, co-workers and subordinates.

[22] The Act does not define harassment. The test in law for what constitutes harassment is an objective one based on a reasonable person standard, not the subjective perceptions of the particular individual. The Tribunal will rely on this principle to determine whether the Appellant was subject to harassment. In determining whether harassment is sufficiently severe or pervasive

to create a hostile environment, the conduct should be evaluated from the objective standpoint of a "reasonable person" wherein the Tribunal considers the offending actions and how a reasonable person would perceive those actions.

[23] The Appellant presented testimony that while no prior incidents of harassing behaviour existed and that he had a good working relationship with everyone involved in the meeting, the tone of the meeting and the decision of the employer to extend his probation created a hostile work environment.

[24] The existence of harassment cannot be viewed in a vacuum, the context of the Appellant's status as a new employee, still within his six-month probationary period, and his previously healthy relationship with his employers must be considered when determining whether the employer's actions constitute harassment. The Tribunal finds that the conduct of the employer in holding a meeting to review performance issues of one of its new employees, the employer's decision to extend the probationary period to further assess the employee's performance, and the employer's decision to allow a representative from HR to be present during the meeting are not unreasonable actions. An employer is expected to review the performance of its employees and raise issues that it feels need to be addressed, especially during an employee's probationary period. The Tribunal finds that the actions of the employer at the meeting on June 8, 2017 do not meet the standard of objectively severe or pervasive behaviour that would necessarily create a hostile work environment.

[25] The Tribunal further considers that the Appellant never brought any issues of harassment to the attention of his employer and did not allow them an opportunity to resolve the situation prior to submitting his resignation. The Appellant has an obligation, in most cases, to attempt to resolve workplace conflicts with an employer, or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job (*White*, supra). The Tribunal finds that the Appellant's testimony does not prove that his interaction with his employer at the June 8, 2017 meeting was significantly serious that it warranted his departure without exploring reasonable alternatives to leaving.

Was there undue pressure by the employer on the Appellant to leave his employment?

[26] Subparagraph 29(c)(xiii) of the Act states that the Appellant has just cause for voluntarily leaving an employment if he had no reasonable alternative, having regard to all the circumstances, including if there was undue pressure by an employer on the Appellant to leave his employment.

[27] The Appellant argued that the employer's extension of his probation and the issues raised at the meeting were tactics aimed at forcing him out of his position. In his opinion, there was no way for him to successfully meet their expectations as they had not clearly outlined them, and the extension of his probation had pushed him into a corner with no options but to quit. He stated that if he continued to work in his position and was dismissed, it would reflect poorly on him professionally and reduce his future work opportunities.

[28] The Appellant testified and provided written submissions that stated he felt "ambushed" by the issues raised at the meeting, which he characterized as "minor" and "inconsequential". The Appellant testified that the majority of these issues had already been corrected and that the rest of the issues should have been brought to his attention at the time that they occurred so that he could have taken steps to "rectify or justify" them. He stated that he had received mostly positive feedback in past interactions with his employer and that he had made several changes that had saved the company significant amounts of money, and so he was shocked at the negative tone of the meeting. The Appellant recalled only one instance of negative feedback from his employer, wherein he was advised that his approach with employees was "too direct" and recommended that he take a "softer tone" with in the future.

[29] The Appellant stated in interviews with the Respondent that he asked his employer during the meeting what he had to do to make things better and was told that they would let him know; that they would set up a time to discuss shortcomings. The Appellant testified at the hearing that during the meeting with his employer he requested a written document that stated the issues he had to improve and how he could improve them and stated that the employer did not provide him with one. When asked, he stated that the employer did not refuse to provide the list, but did not address his request at the meeting. He admits that he did not have an opportunity to speak with his direct supervisors after the meeting, as they left the building and did not return

for the rest of the work day. The Tribunal finds that it would have been reasonable for the Appellant to allow the employer to set up another time to discuss the employer's expectations and what improvements were required for the Appellant to successfully complete his probationary period.

[30] The Appellant testified that the employer hired a replacement for him very shortly after he resigned and without advertising the position. He states that he believes that hiring another person to fill the role so quickly revealed that his employer's agenda with the meeting was to force him out of his position because they had already selected his replacement. He further states that five people have held this position within the past three years. The Tribunal does not consider this evidence persuasive, as the Appellant has no direct proof of when the new employee was hired and through what methods of recruitment. As well, there is no evidence that the previous employees left their employment due to the employer pressuring them to quit, as the Appellant argues.

[31] The Appellant presented the argument that he was treated unfairly and his employer's actions may have constituted constructive dismissal. The Tribunal notes that its findings should not be interpreted as being made with regard to whether or not the Appellant was treated fairly by his employer, either within the common meaning of that term or within the legal parameters of Canadian employment law, as this is irrelevant to the Tribunal. As held by the Federal Court of Appeal, the common law concept of constructive dismissal does not appear in the Act, which creates an insurance scheme for employees who have been separated from their employment because they had no other reasonable alternative. As a result, whether an employee has left voluntarily and is not entitled to benefits under the Act and whether an employee has been constructively dismissed and is entitled to sue his employer are different issues (*Peace*, supra).

[32] The Tribunal finds the Appellant has not provided any evidence to support the allegation of undue pressure to leave; the evidence supports the Appellant made a decision to leave his employment after a one-time incident. The Appellant's testimony that he wasn't aware of any issues with his performance and that he had a good working relationship with his supervisors does not substantiate that there was undue pressure prior to the meeting. The Tribunal considers

that the Appellant's decision to leave may have been a good personal choice but is not sufficient to establish just cause within the meaning of the Act.

Did the Appellant have reasonable alternatives to leaving his employment?

[33] It is not sufficient for the Appellant to prove that he was reasonable in leaving his employment. Reasonableness may be "good cause", but it is not necessarily "just cause".The question is not whether it was reasonable for the Appellant to leave his employment, but rather whether leaving the employment was the only reasonable course of action open to him (*Canada (Attorney General) v. Laughland*, 2003 FCA 129).

[34] The Respondent argues that the Appellant's situation was not so intolerable that he had to immediately leave before first securing other employment. The Appellant argued that he could not have continued in his position while looking for work, as obtaining a job with his experience is not easy and if his employer was aware he was seeking alternative employment, he would have been terminated.

[35] The Tribunal considers that the difficulty that it would take the Appellant to find alternate employment would be even more reason for the Appellant to continue in his position while searching for a new job and avoid a lengthy unemployment. Nothing in the evidence suggests that the Appellant could not have stayed in his employment until termination while at the same time looking for another job.

[36] The Tribunal finds that the Appellant did not have just cause to voluntarily leave his employment. The Appellant's employment contract stated that his employer will review his progress on a regular basis and provide him with feedback. The meeting with his employer does not appear to contravene the employment contract, but supports that his employer was providing him feedback about his performance. The Appellant submits that the employer refused to provide him with corrective actions to take on the issues raised at the meeting, but did not pursue his employer's suggestion to have another meeting to discuss his performance shortcomings, which may have given him a better understanding of their position.

[37] The Tribunal finds that rather than leaving his employment, the Appellant had other courses of action open to him. The Appellant could have met with his employer to discuss the

issues raised at the meeting and their expectations of his performance. The Appellant could also have remained in his position until he had secured other employment. As a result, the Tribunal finds that the Appellant has not demonstrated just cause for voluntarily leaving his employment, having regard to all the circumstances, as he did not prove there was no reasonable alternative to leaving when he did. Therefore, the Appellant is disqualified from receiving any benefits in accordance with sections 29 and 30 of the Act.

CONCLUSION

[38] The appeal is dismissed.

Catherine Shaw
Member, General Division - Employment Insurance Section

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. C., Appellant P. C., Witness for the Appellant

ANNEX

THE LAW

Employment Insurance Act

29 For the purposes of sections 30 to 33,

(a) *employment* refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

(vii) significant modification of terms and conditions respecting wages or salary,

(viii) excessive overtime work or refusal to pay for overtime work,

(ix) significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi) practices of an employer that are contrary to law,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xiii) undue pressure by an employer on the claimant to leave their employment, and

(xiv) any other reasonable circumstances that are prescribed.

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.